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Supreme Court of the United States

OCTOBER TERM, 1970

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No. 204

JAMES EDWARD CRAMPTON,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

Of Counsel:

Dan H. McCullough
William T. Burgess
William D. Driscoll
Gerald S. Lubitsky
Cary Rodman Cooper

John J. Callahan
801 Security Building
Toledo, Ohio 43604
Attorney for Petitioner

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OPINION BELOW

The opinion of the Supreme Court of Ohio (A. 83-88) is reported at 18 Ohio St. 2d 182; 248 N.E.2d 614.

JURISDICTION

The Supreme Court of Ohio entered judgment June 11, 1969 (A. 82). The petition for a writ of certiorari was filed July 31, 1969, and was granted June 1, 1970, limited to questions 2 and 3 of the petition. (A. 89) The jurisdiction of this Court rests on 28 U.S. Code, Section 1257(3).

QUESTIONS PRESENTED

1. Whether the Ohio statute which provides that the trier of fact shall determine both guilt and punishment in a single verdict in cases of murder in the first degree violates petitioner's right to be free from self-incrimination.

2. Whether the Ohio statute which provides that the trier of fact may grant or withhold a recommendation of mercy in cases of murder in the first degree, and which provides no standards or criteria to assist the trier of fact in making such determination, violates petitioner's right to due process and equal protection of the law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

The statutes of the State of Ohio involved in this case are Section 2901.01 of the Ohio Revised Code:[1]

> No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate a rape, arson, robbery, or burglary, kill another.
>
> Whoever violates this section is guilty of murder in the first degree[2] and shall be punished by death

[1] All section references are to the Revised Code of Ohio, effective October 1, 1953. There is no official edition of the Revised Code, but Page's Ohio Revised Code Annotated (1969 edition) or Baldwin's Ohio Revised Code and Service (1964 edition) are accepted by the Ohio courts as authentic.

[2] In addition to the crime defined in Section 2901.01 Ohio Revised Code, Ohio has four other crimes of murder in the first degree in which the penalty is death unless the jury recommends mercy: murder by obstructing a railroad (Section 2901.02); killing a prison guard (Section 2901.03); killing a police officer in the discharge of his duties (Section 2901.04); and abduction resulting in death (Section 2901.28). There are two crimes for which the death

> unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.
>
> Murder in the first degree is a capital crime under Section 9 and 10 of Article I, Ohio Constitution.[3]

and Section 2947.05 of the Ohio Revised Code:

> Before sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court and asked whether he has anything to say as to why judgment should not be pronounced against him.[4]

STATEMENT

Petitioner, James Edward Crampton, a 40-year old man, was indicted for murder in the first degree for the killing of his wife, Wilma Jean, on January 17, 1967. They had been married almost four months at that time. (A. 57)

On November 2, 1966, about six weeks after the marriage, petitioner was admitted as a patient to the psychiatric ward of a private hospital for treatment for excessive use

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penalty is mandatory: killing the President, Vice President, or person in line of succession (Section 2901.09), and killing the Governor or Lieutenant Governor of any state (Section 2901.10). Abducting a person for the purpose of extortion is punishable by death unless the jury recommends mercy (Section 2901.27).

[3]Effective October 1, 1953. 125 Laws of Ohio 7. The death penalty was mandatory on conviction of murder in the first degree prior to April 3, 1898. 33 Laws of Ohio 33 (1835). On that date the General Assembly provided that the jury could recommend mercy, in which case the penalty would be life imprisonment. 93 Laws of Ohio 233. Since that time, the first degree murder statute has remained essentially intact in the definition of the crime and the provision permitting the jury to select punishment.

[4]Effective October 1, 1953. 125 Laws of Ohio 7; 113 Laws of Ohio 197 (1929). Original enactment: 66 Laws of Ohio 313 (1869).

of drugs. (A. 10) After two days there he was transferred by his wife to Toledo State Hospital, where he remained confined under order of the Probate Court of Lucas County, Ohio (A. 12), until late December, 1966, when he was released to his wife for a "trial visit" during the Christmas holiday season. (R. 61)

After the holidays when his wife sought to have him return to the State Hospital, petitioner objected and left the family home. (R. 61) He joined a male friend, one Collins, in Pontiac, Michigan, and during a two-week period they travelled by automobile to places in Michigan and Indiana, frequently taking drugs which they procured with stolen money. (R. 60-72)

On January 17, 1967, they broke into the home of petitioner's mother-in-law, near Toledo, where petitioner obtained a .45-caliber pistol. At about 7:00 p.m. that evening, Collins drove petitioner to the Crampton residence in Toledo. There they parted and petitioner was admitted to the house by his wife. (R. 73-83)

At approximately 11:00 p.m. the same evening, petitioner was arrested while driving a stolen automobile. (R. 136-140) Police officers on searching the car, found a .45-caliber pistol wedged between the front seats. (R. 140) The following morning the body of petitioner's wife was found in her home. She had been shot in the face. (R. 132; 194)

On arraignment, petitioner entered pleas of "not guilty" and "not guilty by reason of insanity" to the charge of murder in the first degree. (A. 4) The court ordered the petitioner committed to Lima State Hospital for 30 days observation.[5] (A. 1, 76) Following psychiatric examina-

[5]Section 2945.40, Ohio Revised Code: "In any case in which insanity is set up as a defense, or in which present insanity of the accused is under investigation by a court or jury, the court may commit the defendant to a local hospital for the mentally ill, or the Lima state hospital, where the defendant shall remain under observation until such time as the court directs not exceeding one month. * * *"

tion it was reported to the court that petitioner was sane, that he understood the nature of the charge against him and could counsel in his own defense.[6] The court then ordered the cause to proceed to trial before a jury. (A. 1, 76)

To support his plea of not guilty by reason of insanity,[7] petitioner presented testimony of a psychiatrist (R. 376-405), and offered into evidence the medical records of his case from Toledo State Hospital (Excerpt, A. 5-20; R. 406) and Lima State Hospital (Excerpt, A. 21-48; R. 407). Petitioner's mother, Charlotte Williams, testified about petitioner's childhood, education and general background. (A. 49-59)

Petitioner did not testify at his trial.

The issues of his guilt, punishment and insanity were simultaneously tried and submitted to the jury. (A. 63-68 (guilt); A. 68-70 (insanity)) On the issue of punishment, the jury was instructed as follows:

> "If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life." (A. 70)
>
> * * *
>
> "You have no right to discuss or consider the subject of punishment if your verdict is manslaughter in the first degree or murder in the second degree. On

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[6]Where a person committed to Lima State Hospital was of sufficient soundness of mind to understand and appreciate the nature of the charge against him, to comprehend his situation, and was mentally capable of furnishing his counsel facts essential to the presentation of a proper defense, he may be returned to the proper county for trial. *State ex rel. Townsend v. Bushong*, 146 Ohio St. 271; 65 N.E.2d 407 (1946).

[7]A defendant who enters a plea of not guilty by reason of insanity must establish such defense by a preponderance of the evidence. *State v. Austin*, 71 Ohio St. 317; 73 N.E. 218 (1905); A. 69.

those two charges, your duty is confined in the determination of the guilt of the defendant. In the event you find the defendant guilty, the duty to determine the punishment is placed, by law, upon the court.

"You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your finding, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict.

"Consider all the evidence and make your findings with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel their case was fairly and impartially tried. * * *" (A. 71-72)

Petitioner was found guilty of murder in the first degree, without a recommendation of mercy (A. 2, 78), and the trial court sentenced him to death in the electric chair. (A. 2-3, 79)

On appeal to the Sixth District Court of Appeals of Ohio, the judgment of the trial court was affirmed. (A. 80)

In his appeal to the Supreme Court of Ohio,[8] petitioner raised the question of the constitutional propriety of the single-verdict procedure and the question of permitting the jury absolute discretion in the matter of punishment. The

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[8]Article IV, Section 2(B)2 of the Ohio Constitution was amended effective May 7, 1968, to provide that: "The supreme court shall have appellate jurisdiction as follows: (a) In appeals from courts of appeals as a matter of right in the following . . . (ii) Cases in which the death penalty has been affirmed * * *." Prior to the adoption of this amendment, a defendant in a capital case where the death penalty had been affirmed was required to raise a substantial constitutional question or a question deemed of "general and great public interest" to gain a review of his case in the Supreme Court. Petitioner's appeal to the Supreme Court of Ohio was filed August 13, 1968.

Supreme Court of Ohio rejected the petitioner's claims (A. 86-87 (single-verdict procedure); A. 88 (absolute jury discretion)) and affirmed the judgments of the lower courts. (A. 82)

SUMMARY OF ARGUMENT

I.

Petitioner challenges Ohio's unitary trial procedure[9] which required him to submit three issues to simultaneous trial by jury: (1) guilt or innocence, (2) sanity or insanity, and (3) punishment of life or death. On the issue of punishment, he was barred from presenting any evidence to support a plea for mercy and was prevented from exercising his right of allocution until after his fate had been finally and irrevocably decided by the jury. At the same time the jury was considering his guilt and punishment, he was forced by the procedure to submit his medical records, with their incriminating case histories, to sustain his defense of insanity.

Such procedure violates a defendant's Fifth Amendment protection against self-incrimination because it unnecessarily compels him to choose between exercising his Fifth and Fourteenth Amendments right against self-incrimination (*Malloy v. Hogan*, 378 U.S. 1 (1964)) and his Fourteenth Amendment right "to be heard . . . and to offer evidence of his own" (*Specht v. Patterson*, 386 U.S. 605, 610 (1967)) on the question of his punishment. As a result, petitioner

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[9]In two other instances Ohio law authorizes the jury to set the punishment: breaking and entering an inhabited dwelling at night, which is punishable by life imprisonment unless the jury recommends mercy, in which case the punishment is 5 to 30 years imprisonment (Section 2907.09, Ohio Revised Code), and robbery and unlawful entry of a financial institution, which is punishable by life imprisonment unless the jury recommends mercy, in which case the punishment is not less than 20 years imprisonment (Section 2907.141, Ohio Revised Code).

was forced to make "an unfree choice" (*North Carolina v. Pearce*, 395 U.S. 711, 724 (1969)). His election to exercise his right against self-incrimination deprived the jury of his testimony in mitigation, and the jury's decision as to his punishment was made "upon less than all of the relevant evidence" (*Jackson v. Denno*, 378 U.S. 368, 389, n. 16 (1964)). The exercise of the Fifth Amendment privilege, therefore, is needlessly penalized (*United States v. Jackson*, 390 U.S. 570 (1968); *Simmons v. United States*, 390 U.S. 377 (1968)), and the penalty is increased when the procedure compels the submission to the jury of the issue of a defendant's insanity simultaneously with the issues of his guilt and punishment. The resulting confusion of issues prevents the "reliable and clear-cut determination" required by the Due Process Clause (*Jackson v. Denno, supra.*).

II

Ohio's practice of commiting the question of a capital defendant's punishment to the exclusive and uncontrolled discretion of the jury results in arbitrary and discriminatory imposition of the death penalty. The jury is not required to find any requisite facts on which to base its choice, nor is it informed of any general rule of policy underlying the state's retention of alternate punishments for the crime of first degree murder, which crime includes a broad range of homicide offenses. The jury's determination is absolute, final and free from any judicial control or review.

A defendant cannot present evidence to support a plea for mercy and is barred from addressing that point until his final argument to the jury. This unilateral procedure prevents the jury from considering all the evidence relevant to the question of punishment.

The practice of permitting the jury unrestricted discretion prevents a capital defendant from knowing how to conduct his defense on an issue which may cost him his life. He is forced to guess at what the jury will consider significant in deciding whether he lives or dies.

This court has condemned as a violation of the Due Process Clause vague and standardless statutes (*Giaccio v. Pennsylvania*, 382 U.S. 399 (1966)) imposing, at the jury's discretion, a small amount of costs on a defendant. Certainly that clause applies with equal vigor when the unbridled discretion of the jury may forfeit a human life.

The capital jury in Ohio has the "naked and arbitrary power" (*Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886)) to make "an invidious discrimination" (*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)) in violation of the constitutional guaranty of Equal Protection of Law.

ARGUMENT

I

THE PROCEDURE IN CAPITAL CASES WHEREBY THE TRIER OF FACT DETERMINES BOTH GUILT AND PUNISHMENT IN A SINGLE VERDICT VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION BECAUSE AN ACCUSED PERSON IS COMPELLED TO RELINQUISH HIS RIGHT AGAINST SELF-INCRIMINATION WHEN HE TESTIFIES ON THE QUESTION OF PUNISHMENT.

Under Ohio procedure the jury in this case was required to hear and decide simultaneously three issues:

1. Whether Crampton was guilty or not guilty of murder in the first degree;
2. Whether Crampton was sane or insane at the time of the alleged crime;
3. Whether Crampton should die by electrocution or be imprisoned for life.

On the first issue the state was required to produce evidence to establish guilt. On the second issue the burden of proof was on petitioner to produce evidence of his mental state at the time of the alleged crime.[10] But on the third

[10] *State v. Austin*, 71 Ohio St. 317; 73 N.E. 218 (1905); (A. 69).

issue, the dominant question of whether he should live or die, petitioner was barred from offering any evidence. Under Ohio practice, a defendant in a capital case pleading for mercy is prohibited from introducing any evidence to support that plea, as the matter of punishment is not recognized as an issue upon which evidence may be presented.[11]

The jury under this procedure hears evidence on the issues of guilt and insanity, and decides these two issues, together with the issue of punishment, on which no evidence is permitted, at a single sitting. Not until the argument phase of the trial is reached is a defendant permitted to mention the matter of punishment to the jury, and then his counsel is granted merely the "privilege . . . to argue" that question on the basis of evidence which has been directed only to the question of the defendant's guilt.[12] Petitioner, therefore, was compelled throughout the trial to assume simultaneously the paradoxical positions of contending that he was not guilty, but that if he were guilty, he was not responsible for his action because he was insane at the time; but that if he were both guilty and responsible for his action, he should be granted mercy. Such defense can only be self-destructive. The plea for mercy will be interpreted by the jury as a confession of guilt. The plea of insanity will be viewed as an attempt to escape any punishment. The defendant's alternative is to stand solely on a plea of not guilty, which means, in effect, risking all on a plea of innocence. If the jury returns a verdict of guilty, it may then elect to impose the death penalty because, as laymen, they think the defendant sought to trick them into believing he is innocent.

Such procedure cannot be other than mortally prejudicial to a defendant on trial for murder in the first degree. He can present no evidence on the question of punishment.

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[11] *Ashbrook v. State*, 40 Ohio App. 298; 197 N.E. 214 (1935).

[12] *Shelton v. State*, 102 Ohio St. 376; 131 N.E. 704 (1921).

Under the defense of insanity, he may introduce evidence to prove that he was not responsible for his actions, but while such evidence might be deemed mitigating with reference to the issue of punishment, the jury is instructed that it must be considered only with reference to the issue of guilt.[13] (A. 70) If a defendant wishes to testify in support of the defense of insanity, or to explain to the jury the circumstances at the time of the crime, he can do so only if he surrenders his right to be free from self-incrimination. Once he decides to take the witness stand, he subjects himself not only to cross-examination about the crime for which he is on trial, but also to impeachment—a process which, in Ohio, permits the state to introduce a broad spectrum of potentially prejudicial evidence.[14] Having once testified, he may find himself recalled for further cross-examination in the state's case in rebuttal.[15] If, on the other hand, a defendant elects not to testify, he risks the sentence of death from a jury ignorant of his character and background, and totally unaware of any mitigating facts surrounding the commission of the alleged crime.

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[13]*Ashbrook v. State*, 49 Ohio App. 298; 197 N.E. 214 (1935).

[14]*Hanoff v. State*, 37 Ohio St. 178 (1881); *Sabo v. State*, 119 Ohio St. 231; 163 N.E. 28 (1928). Ohio law permits a witness to be cross-examined about prior convictions for felonies and statutory misdemeanors, *State v. Murdock*, 172 Ohio St. 221; 174 N.E.2d 543 (1961); his connection with other similar acts, *State v. Hollos*, 76 Ohio App. 521; 65 N.E.2d 144 (1944); prior convictions in military service, his dishonorable discharges and numerous changes in employment, *State v. Williams*, 85 Ohio App. 236, 88 N.E.2d 420 (1947); and about pending indictments, *State v. Hector*, 19 Ohio St. 2d 167; 249 N.E.2d 912 (1969). The limits of cross-examination of a witness to test his recollection or credibility must rest largely within the discretion of the court and prejudicial error results only where the record clearly shows abuse of that discretion. *Keveny v. State*, 109 Ohio St. 64; 141 N.E. 845 (1923).

[15]*Johns v. State*, 42 Ohio App. 412; 182 N.E. 356 (1931); appeal dismissed by Ohio Supreme Court, 124 Ohio St. 671 (1932).

Although Ohio by statute extends the right to allocution to criminal defendants,[16] the effective exercise of that right is nullified in cases where the accused is convicted of murder in the first degree because the jury then selects the punishment and pronounces sentence on the defendant. The subsequent sentencing by the court merely echoes the jury's decision and, although the court must ask the defendant[17] "whether he has anything to say as to why judgment should not be pronounced against him," nothing he can say will prevent the court from imposing the punishment previously determined by the jury.[18] Allocution in capital cases, therefore, is meaningless, and the sentencing of the defendant by the court is reduced to an incantation ritual.

Once the jury has decided that a defendant must die, that decision stands immune from judicial review by both the trial and appellate courts in Ohio. Only if the trial or

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[16]Section 2947.05, Ohio Revised Code: "Before sentencing is pronounced, the defendant must be informed by the court of the verdict of the jury, or the finding of the court, and asked whether he has anything to say as to why judgment should not be pronounced against him."

[17]Allocution is mandatory. Failure by the court to grant a defendant the right is reversible error. *Silsby, et al. v. State,* 119 Ohio St. 314; 164 N.E. 232 (1928).

[18]Section 2947.06, Ohio Revised Code, effective September 24, 1963 (original enactment: 46 Laws of Ohio 52 (1848)), provides that: "The trial court may hear testimony of mitigation of a sentence at term of conviction or plea, or at the next term. The prosecuting attorney may offer testimony on behalf of the state, to give the court a true understanding of the case. The court shall determine whether sentence ought immediately to be imposed or the defendant placed on probation. * * *." While permitting the court to hear testimony in mitigation of a sentence, this section does not authorize the court to set aside, modify or reverse a sentence, but only to delay imposition of the sentence or to place defendant on probation. Although no court test of the applicability of this section to capital cases appears in the records, it is doubtful that it has any reference to cases other than those where the judge determines and imposes sentence.

reviewing court uncovers a prejudicial error of law requiring that the *conviction* be reversed, or finds that the evidence was insufficient *to convict*, can the jury's judgment on the issue of punishment be set aside.[19]

The Ohio procedure of a single-verdict trial, therefore, forced petitioner at the commencement of his trial to make an agonizing appraisal of the alternatives available to him. Under the Constitution, he was guaranteed certain procedural rights in the sentencing process: "an opportunity to be heard . . . and to offer evidence of his own." *Specht v. Patterson*, 386 U.S. 605, 610 (1967); *Mempa v. Rhay*, 389 U.S. 128 (1967). By statute, he was given the right of allocution. If these rights were to be exercised effectively, petitioner had to exercise them *before* sentencing, but to do so within the single-verdict procedure of Ohio would have required him to surrender his constitutional right against self-incrimination, *Malloy v. Hogan*, 378 U.S. 2 (1964); *Griffin v. California*, 380 U.S. 609 (1965) and face cross-examination that could incriminate him.

Confronted with choosing between these alternatives at the risk of his life, petitioner declined to surrender his right against self-incrimination. His voice was never heard by those who condemned him to die, and only after his fate had been decided was he asked, in an empty gesture, whether he had anything to say as to why judgment of death by electrocution should not be pronounced against him. (R. 438-440; App. 1a-3a, *infra*)

The Ohio practice produces a bruising antagonism between constitutional rights at a time when a defendant is impelled to choose one of the two rights he wishes to assert at his trial—the right to speak to his sentencer or the right to

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[19] *State v. Frohner*, 150 Ohio St. 53; 80 N.E.2d 868 (1948); *State v. Snow*, 12 Ohio Op. 200; 32 N.E.2d 36 (1938); appeal dismissed by Ohio Supreme Court, 134 Ohio St. 239 (1938); *Hoppe v. State*, 29 Ohio App. 467; 163 N.E. 715 (1928); appeal dismissed by Ohio Supreme Court, 119 Ohio St. 651 (1928).

remain silent. In effect, a defendant is coerced into choosing one of the rights because he fears the consequences that may result from selecting the other. His choice, therefore, is not a completely free one.

The dilemma confronting a defendant is far more than an uncertainty as to trail tactics. Under the single-verdict procedure, he is placed "in the dilemma of making an unfree choice." *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969). He knows that on the question of his guilt, the jury will be instructed what to consider and what not to consider. He knows that on the issue of his punishment, the jury is free to condemn him for any reason, for no reason, or for twelve different reasons. The single-verdict procedure so intertwines the issues of guilt and punishment that a defendant in deciding how to proceed in the trial of these issues is faced with choices which entail the exercise or relinquishment of certain guaranteed rights while forewarned that the jury is free to make death the price of his selection.

This antagonism between fundamental rights generated by the Ohio procedure comes within the prohibition of *Simmons v. United States*, 390 U.S. 377 (1968). There the defendant faced the dilemma of either giving up what he believed to be a valid Fourth Amendment claim, or "in legal effect, to waive his Fifth Amendment privilege against self-incrimination." This Court held it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Ibid.*, 394.

This Court has also held that the exercise of the Fifth Amendment right against self-incrimination in criminal trials must not be penalized or needlessly burdened. *United States v. Jackson*, 390 U.S. 570 (1968). The simultaneous submission to the jury of both the guilt and the punishment issues results in just such a penalty and needless burden: the defendant must risk his life if he chooses to remain silent at his trial.

That the single-verdict procedure is an unnecessary burden on the exercise of the Fifth Amendment right is clear when

the alternative procedures available to the state are considered: (1) A bifurcated jury trial, where the jury first decides the guilt or innocence of the accused, and then, if the verdict is guilty, hears evidence in mitigation and aggravation and fixes or recommends the punishment; (2) sentencing by a judge, either with or without the recommendation of the jury; and (3) the elimination of the death penalty.

In *United States v. Jackson*, 390 U.S. 570 (1968), this Court examined the provision of the federal kidnapping statute granting the jury the exclusive prerogative to inflict the death sentence, and considered whether such provision "needlessly encourages" waivers of jury trial and pleas of guilty and thereby "needlessly chill(s) the exercise of basic constitutional rights," 390 U.S., at 582, 583. The question in the case at bar is identical: Does the simultaneous trial of guilt and punishment *needlessly encourage* waiver of the right to remain silent or *needlessly chill* the right to allocution and to present evidence on the issue of punishment relevant to rational sentencing? "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." 390 U.S., at 582. Since the alternative modes of procedure available to the state do not involve the same destructive collision of the defendant's rights, the "chilling effect" of the single-verdict procedure clearly "is unnecessary and therefore excessive."

In the case at bar the burden imposed by the single-verdict procedure was enhanced when petitioner sought to plead the affirmative defense of insanity. The jury then was required to consider whether petitioner was responsible for his acts in addition to determining his guilt and punishment.

To sustain the defense of insanity, medical evidence of petitioner's mental condition, not only at the time of the crime but also prior to the crime, had to be offered by petitioner to the jury.[20] The medical evidence available to him

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[20] *State v. Austin*, 71 Ohio St. 317; 73 N.E. 218 (1905).

consisted of the records of his confinement at Toledo State Hospital and Lima State Hospital, both of which records contained reports of his statements to psychiatrists, psychologists and case workers about his convictions and imprisonment for prior crimes. The history of petitioner's use of drugs was, of necessity, also included in these records.

In deciding how to conduct his defense in a trial where the issues of guilt, insanity and punishment were decided simultaneously at one sitting of the jury, petitioner was confronted with a second and equally wrenching dilemma affecting his rights: either support the plea of insanity, and thereby permit evidence of bad character and unrelated crimes to reach the jury, or abandon his plea of insanity and risk everything on the lone plea of innocence. If he were to support his plea of insanity, the evidence introduced and directed to the question of his responsibility for the commission of the act would be certain to prejudice the jury's consideration of the other issues of guilt and punishment. If, on the other hand, petitioner were to abandon his plea of insanity, he would be deprived of a possibly valid defense, and the jury would decide his fate unaware that he may not have been responsible for the commission of the crime. Whichever course he chose, his choice had to be made under the compulsion of a procedure which commanded him to offer countervailing evidence on the question of guilt and thereby prejudice himself on the question of punishment, or withhold such evidence and risk his life before a jury which would not be fully informed on all of the facts of his case.

Here, again, the unitary trial procedure forces a choice and creates the "undeniable tension" between constitutional rights condemned in *Simmons v. United States*, 390 U.S. 377, 394 (1968). Petitioner for a second time faced the dilemma of surrendering one constitutional right in order to exercise another. The Due Process Clause guaranteed him a fair trial on the issues of guilt and punishment, *Irvin v. Dowd*, 366 U.S. 717 (1961); *Townsend v. Burke*, 334 U.S. 736 (1948), "and an adequate opportunity to be heard in

defense of (the charge)." *Powell v. Alabama*, 287 U.S. 45, 68 (1932); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). But the confusion of issues produced by the unitary trial procedure required petitioner to present his defense of insanity in such manner that it could only infect the jury's consideration of guilt and punishment. Had he opted to forego presenting evidence of insanity, he would be denied the opportunity to assert a defense he considered valid. No matter which choices petitioner made in the two dilemmas thrust upon him by the existing procedure, on each occasion he had to surrender on constitutional right in order to gain the benefit of another. Here, he had to give up his right to a fair hearing on the issue of punishment in order to assert the defense of insanity.

In *Jackson v. Denno*, 378 U.S. 368 (1964), this Court recognized that the questions of the voluntary nature of a confession and the guilt of the accused where two issues which could not be considered simultaneously by a jury because of the substantial threat that the evidence bearing on one issue would contaminate the jury's consideration of the other, thereby preventing either issue from being "fairly and reliably determined." 378 U.S., at 389. The Ohio practice compounds this hazard of contamination by compelling the submission of a third issue potentially prejudicial to the jury's consideration of the other two. Such procedure is not "fully adequate . . . to insure a reliable and clear-cut determination" of the issues required by the Due Process Clause, 378 U.S., at 391.

Although in *Spencer v. Texas*, 385 U.S. 554 (1967), this Court declined to bring that state's procedure of informing the jury of previous convictions within the proscription announced in *Jackson v. Denno*, its refusal to do so was grounded on the fact that the Texas procedure involved no "specific constitutional right." 385 U.S., at 565. The case at bar focuses on petitioner's constitutional right not to incriminate himself. He was denied that right when he was compelled to submit the issues of guilt, insanity and punish-

ment simultaneously to the jury. Were it not for a procedure which forced the trial of all three issues at once, petitioner would not have been compelled to submit to the jury his medical records, with their prejudicial case histories, until after his guilt had been decided, and he would not have been forced to remain silent if he could have exercised his right of allocution at a time when it could have been effective.

The Ohio procedure coerces a defendant into choosing between alternatives, forewarning him that whatever choice he makes he is wagering his life:

On the issues of guilt and punishment:

(1) If he exercises his right against self-incrimination, he risks his life to a jury which will have less than all relevant evidence on the question of his punishment, or

(2) If he waives his Fifth Amendment right, he subjects himself to cross-examination and impeachment.

On the issue of insanity:

(1) If he asserts his right to plead not guilty by reason of insanity, he takes the risk that the medical evidence of his mental condition will disclose data prejudicial on the issues of guilt and punishment, or

(2) If he declines to plead not guilty by reason of insanity, he surrenders his right to a fair trial before a jury not fully informed of all relevant facts.

"(I)t flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him." *Spencer v. Texas*, 385 U.S. 554 575 (Warren, C. J., dissenting). This is no less true when the jury decides the question of punishment.

The unitary trial procedure followed in Ohio aided the state in convicting petitioner. He was forced to present evidence containing prejudicial data about himself which would not have been obtainable by the State "but for the defend-

ant's coerced cooperation." *Williams v. Florida*, 399 U.S. 78, 110 (1970) (Black, J., dissenting in part). The effect of this evidence upon a jury considering the issues of guilt and punishment was certain to be prejudicial to petitioner. Had he been afforded the opportunity to present evidence on the issue of insanity, apart from the issue of punishment, his right to a fair trial would have been protected; and had he been permitted to address the jury on the issue of his punishment, he would not have been compelled to invoke his Fifth Amendment right at the risk of his life. The single-verdict procedure in Ohio, as it presently functions in capital cases is nothing less than a practice requiring "the defendant to assist the state in convicting him, or be punished for failing to do so.'" *Ibid.*, 399 U.S. at 115.

II

THE PRACTICE OF GRANTING THE TRIER OF FACT ABSOLUTE AND UNCONTROLLED DISCRETION IN CAPITAL CASES TO CHOOSE BETWEEN THE PENALTIES OF LIFE AND DEATH VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES BECAUSE THE TRIER OF FACT MAKES ITS DETERMINATION UNGUIDED BY ANY STANDARDS FIXED BY LAW.

Section 2901.01, Ohio Revised Code, establishes the punishment for the offense of murder in the first degree:

> "Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life."[21]

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[21] Applicable also to a bench trial. Section 2945.06 of the Ohio Revised Code provides that: "In any case in which a defendant waives his right to trial by jury and elects to be tried by the court . . . If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges . . . Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment

Whether or not such recommendation should be made "is a matter vested fully and exclusively in the discretion of the jury."[22] The only requirement for the valid exercise of this discretion is that it must be based upon the evidence presented at the trial. In *Howell v. State*, 102 Ohio St. 411; 131 N.E. 706 (1921), the Ohio Supreme Court held that it was not error to charge the jury in a capital case "to consider and determine whether or not, in view of all the circumstances and facts leading up to, and attending the alleged homicide as disclosed by the evidence, you should or should not make such recommendation."

Although the *Howell* instruction may be viewed as establishing a standard to guide the jury in determining punishment, it is a totally inadequate standard and, in subsequent decisions by the Ohio Supreme Court, has been diluted to a point where a jury in a capital case is merely told, as it was in the case at bar (A. 70, 71), that it has to make a choice of punishments on the basis of the evidence.[23]

Simply directing the jury to consider the bulk of the evidence without advising them what to look for in the evidence or how to analyze it with reference to the punishment question can hardly be deemed an instruction providing the jury with criteria or guidelines for the exercise of its discretion.

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accordingly. If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of the crime, and pronounce sentence accordingly. In rendering judgment of conviction of an offense punishable by death, upon a plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury." *State v. Frohner*, 150 Ohio St. 53; 80 N.E.2d 868 (1948).

[22] *State v. Ellis*, 98 Ohio St. 21; 120 N.E. 218 (1918); *State v. Tudor*, 154 Ohio St. 249; 95 N.E.2d 385 (1950).

[23] *Rehfeld v. State*, 102 Ohio St. 431; 131 N.E. 712 (1921); *State v. Karayians*, 108 Ohio St. 505; 141 N.E. 334 (1923).

Juries attempting to function under such instruction have sought to draw specific standards from the court before determining punishment, but have been frustrated by the Ohio rule which permits the jury to learn only that it has a discretionary choice based on the evidence of the case.[24]

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[24] *State v. Caldwell*, 135 Ohio St. 424; 21 N.E.2d 343 (1939). The opinion discloses the following colloquy between the foreman of the jury and the court, 135 Ohio St. at 425; 21 N.E.2d at 344:

> "'The Foreman: What are the grounds for granting mercy?
>
> "'The Court: That rests solely and wholly in your sound discretion. You should determine whether or not in your discretion mercy should be granted from a consideration of the evidence, the character of the crime and the attending circumstances. Are there any other questions which you have?
>
> "'The Foreman: No, I don't think so. I beg your pardon. I have another question or two. What are extenuating circumstances? Are they something which we can determine in our judgment alone?
>
> "'The Court: No, if there are any, you must determine them from the evidence.
>
> "'The Foreman: Well, then, may we consider sociological matters and environment in determining this question of granting mercy?
>
> "'The Court: No—they have nothing whatever to do with this case.
>
> "Thereupon the defendant, through his counsel objected to the form and substance of the court's charge and requested that the following instructions be given to the jury:
>
> "'* * * Your honor, I request that you instruct the jury in substance as follows: In determining whether or not in your discretion you shall grant mercy to the defendant, you may consider environmental factors and sociological conditions, and in determining whether or not these factors exist you shall consider all the evidence permitted to go to you in this case, and all reasonable inferences to be derived therefrom. You may also consider, in making up your mind on the question of mercy, the appearance, demeanor and actions of the defendant as you have seen him here in open court.
>
> "'The Court: No. I can not so instruct the jury.'"

The Ohio Supreme Court held that the refusal to give the requested instruction did not constitute prejudicial error. *Ibid.*, at 428. See also *State v. Pierce*, 44 Ohio L. Abs. 193; 62 N.E.2d 270 (1945), where another jury sought instruction on the question of punishment.

The decision on punishment, once made by the jury, is absolute and final, not subject to review or modification by the trial court or the appellate courts unless the verdict of conviction is found to be legally erroneous or based on insufficient evidence.[25] Thus in a capital case Ohio invests twelve laymen with the power of life and death to be exercised, after hearing evidence, at their uninhibited discretion, unrestricted by any revieving authority.

What is the nature of this discretion that can deprive a man of his life?

First, its exercise is not required to rest upon any prerequisite findings of fact. In virtually every other judgment made by a jury, in either civil or criminal cases, there is a requirement that specific factual findings be made before a determination of the issue at bar can be reached, but a jury in a capital case is absolved from making any finding on which to base its selection of the punishment to be imposed.

Second, the jury is given no guide in determining which circumstances preclude the imposition of the death penalty.

Third, in deciding the question of punishment, the jury is not told which facts it must specifically consider. The court merely says "consider all the evidence . . ."

Fourth, there is no enumeration by the court of any facts or concerns which the jurors *may* consider.

Fifth, nor is there an enumeration of facts or concerns which the jury *should not* consider, other than the general injunction that the decision be made "without bias, sympathy or prejudice . . ."

Sixth, the jury is given no legal norm or standard to guide its judgment. The equivalents of the standard of "reasonable care" or the "reasonably prudent man" are missing in the charge given the jury in a capital case.

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[25] See footnote 19, p. 10, *supra*.

Seventh, the jury is unfamiliar with even the general objectives of the state in authorizing capital juries to decree that some murderers may live and others die.

Eighth, assuming that judicial review were authorized, the exercise of such broad descretion prevents effective review.

A jury permitted to exercise discretion of this nature in a capital case is armed with nothing less than the raw and arbitrary power to kill or let live, unguided by principle, undirected by concern for specified relevant facts, uncontrolled by general rules of law, free to exercise its power for any reason or for no reason, and unreviewable by any other legal authority.

When such lethal agency is set in motion by the state, it is obligatory that the life-or-death decision it makes in the exercise of its discretion rest upon data as complete and exhaustive as can be presented by the parties who will be affected by the decision. But under Ohio practice, the jury in making its selection of men to die, is deprived by the single-verdict procedure of information necessary to make a rational selective judgment on that issue, as was argued in Part I hereof, pp. 8-16, *supra*. A defendant cannot put before the jury data which he believes it should have from him in order to make a rational decision on his punishment unless he waives his Fifth Amendment Privilege. Even if he attempts to introduce evidence of prior mental illness or insanity at the time of the crime, as petitioner did, he does so at the risk of the jury's being prejudiced by it on the issue of his guilt.

In capital cases Ohio juries are instructed that the question of punishment "should be determined from the knowledge the juror acquires as a juror and from the facts and circumstances developed or undeveloped by the evidence."[26]

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[26] *Howell v. State*, 102 Ohio St. 411; 131 N.E. 706 (1921).

The jury however, is prevented from acquiring any knowledge of facts or circumstances which the person accused deems helpful to him on the issue of punishment, as the defendant is foreclosed by law from offering evidence "directed toward a claim for mercy."[27] Although a defendant is permitted "to argue to the jury the desirability, advisability or wisdom of recommending mercy,"[28] effective argument on that point is virtually impossible when the defendant is barred from introducing evidence which would provide the necessary grist for the argument. The concession in the law that the defendant may argue for mercy but only on the basis of evidence of the commission of the crime is as much an empty gesture as granting him the right of allocution after his sentence has already been determined.

Indeed, a defendant is a capital case under the Ohio procedure is prohibited from even mentioning the subject of mercy to the jury until the argument of the case. He cannot inquire of the veniremen on voir dire as to their opinions of the wisdom or unwisdom of a recommendation of mercy in the event of a conviction of murder in the first degree.[29] Discussion by a defendant of the question of whether he should be permitted to continue to live is forbidden to him at all times throughout the trial of the case.[30] He is denied the right to address the jury on the subject of mercy until the trial is all but completed, and then at the eleventh hour he finds himself in the position of imploring the jury for mercy after having denied his guilt throughout the trial. The effect on a jury of laymen can only be that the defendant attempted to deceive them as to his guilt from the outset of the trial, but now admits his crime and seeks their mercy.

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[27] *Ashbrook v. State*, 49 Ohio App. 298; 197 N.E. 214 (1935).

[28] *Shelton v. State*, 102 Ohio St. 376; 131 N.E. 704 (1921).

[29] *State v. Ellis*, 98 Ohio St. 21; 120 N.E. 218 (1918).

[30] *Ashbrook v. State*, 49 Ohio App. 298; 197 N.E. 214 (1935); *State v. Ellis*, 98 Ohio St. 21; 120 N.E. 218 (1918).

As they enter upon their deliberations on the question of punishment, the jurors are totally ignorant, despite what they have heard at the trial, as to the reasons underlying the procedure which obliges them to determine whether a man should live or die for having committed the crime of murder in the first degree. They know only that they have the power of life and death over an individual, but what considerations they should bear in mind in exercising that power have not been explained to them, except to say that they should "consider all evidence" and act "impartially without bias, sympathy or prejudice." They are entirely unaware of any general objectives the state may have had in mind in imposing on them the task of deciding whether a man lives or dies.

If there is any objective in the procedure which authorizes a jury to make a choice between life and death as punishment, it can only be that the state intends that the jury differentiate among individuals who have committed the crime of murder in the first degree. But why differentiate? —unless there are certain purposes to be served by selecting some murderers to live and condemning others to die. The State of Ohio has not identified the objectives which it thinks worthy of consideration in support of its decision to retain death by electrocution as punishment for murder in the first degree; nor has it defined the objectives which impelled it to permit some first-degree murderers to live. When a sentence is imposed in the case of a non-capital crime, it is generally on the basis that the security of the community requires that the offender be incarcerated. But when a capital offender is sentenced, that premise is disregarded in the cases of some men, but not others, and there is no rational explanation of why, considering this same security of the community, some men are permitted to live and others are sentenced to die.

The range of capital murder cases and the convicted defendants whose punishments differ is extraordinarily

broad.[31] The Ohio statute on murder in the first degree includes murder by means of poison, or in perpetrating or attempting to perpetrate a rape, arson, robbery, burglary and those homicides committed with deliberate and premeditated malice.[32] The element of deliberate and premeditated malice requires no appreciable duration of time. The test in Ohio, as in other states, is the "existence of the reflection," not the quantum of time.[33] It is inconceivable that the legislature which authorized the death penalty in all of those cases intended that it should be used in very many of them, and, indeed, in practice it is used in only a relatively small number.[34]

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[31] For other capital crimes in Ohio, see footnote 2, p. 2, *supra.*

[32] Section 2901.01, Ohio Revised Code.

[33] *State v. Stewart,* 176 Ohio St. 156; 198 N.E.2d 439 (1964), A. 64-65.

[34] From 1949 to 1958, there were 217 (estimated) convictions for murder in the first degree in Ohio, but only 49 of the defendants were sentenced to death. From 1959 to 1968, the figures are as follows:

Year	Number of First-Degree Murder Convictions	Number of Death Sentences Upon Convictions
1959	24	less than 7; exact figure unreported
1960	24	2
1961	27	5
1962	33	3
1963	23	2
1964	34	6
1965	42	8
1966	38	5
1967	45	9
1968	58	10
Total	348	54

The source of the 10 conviction figures is Ohio Judicial Criminal Statistics, an annual publication of the Department of Mental Hygiene and Correction of the State of Ohio. The source of the death-

The agency utilized by the State of Ohio in imposing the death penalty, where the accused demands a jury trial, is a panel of twelve laymen selected to try a particular case.[35] They assemble, hear evidence only on the question of guilt, impose the punishment which they think proper in the exercise of their absolute and unlimited discretion, and then disperse. Before they came together as jurors, it is highly unlikely that any of them had given any thought as to what considerations should influence a decision to permit a man to live or to condemn him to death. While they sit as jurors, they are given no instructions, guidelines, standards or criteria to assist them in deliberating on possibly the most momentous decision they will make in their lifetimes. For a brief span of time, the capital jury becomes an *ad hoc* legislature, forming its own but unascertainable standards for determining whether a man should live or die.

Petitioner submits that the Ohio practice, as above described, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment for the reasons so compellingly argued in the dissenting opinion of Justice Tobriner in *In re Anderson*, 69 Cal. 2d 613,__; 447 P. 2d 117, 131 (1968), in which opinion he was joined by Chief Justice Traynor and Justice Peters. The dissenters contended that a statute which confers absolute discretion on the trier of fact "subjects the convicted capital defendant to a power of arbitrary decision" and violates the "constitutional impera-

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sentence figures is the National Prisoner Statistics Bulletin entitled "Executions" or "Capital Punishment," an annual publication of the Bureau of Prisons of the United States Department of Justice.

The 1959-1968 figures include both jury and bench trials. The figures for the prior period are not clear as to whether they are for jury trials only or for all trials.

[35]A unanimous verdict is required. Article I, Section 5, Ohio Constitution: "The right of trial by jury shall be inviolate, except that in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

tive that laws infringing upon life and liberty be framed in terms of reasonably ascertainable standards."[36]

In order to satisfy the requirements of the Due Process Clause, a statute defining a criminal act must set forth standards sufficiently ascertainable to give adequate warning of which acts will be punished. *Winters v. New York*, 333 U.S. 507 (1948). If it does not, it deprives a defendant of his right to a reasonable opportunity to prepare and present his defense, and it effectively prevents judicial control and review of the relevancy and sufficiency of the evidence. *Garner v. Louisiana*, 368 U.S. 157, 163-164 (1961); *Thompson v. Louisville*, 362 U.S. 199, 206 (1960).

Section 2901.01, Ohio Revised Code, exemplifies both vices of vague laws which the Due Process Clause prohibits. First, although the offenses for which a person may be put to death are clearly prescribed in the statute, the circumstances under which he may receive the death penalty rather than the penalty of life imprisonment are not expressed. A capital defendant, therefore, is prevented from knowing how to show that he qualifies for that class of capital offenders for whom the law contemplates the lesser penalty of life imprisonment. Secondly, the total absence of standards in the administration of the death penalty deprives a defendant in a capital case of any way to protect himself against an arbitrary imposition of that penalty.

The Ohio statute forces a capital defendant to become an unwilling participant in a deadly guessing game. He cannot know what facts or positions will save him or cost him his life. The legislature has not disclosed to anyone when the death penalty is to be imposed or when it is not to be imposed. The jurors are free to take their own views of the matter. With the views on capital punishment being what they are in contemporary society, and with justifications for the death penalty being obscure matters of personal taste, the attitudes of the jurors will range wildly.

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[36] *Ibid.*, 447 P.2d at 138 (1968).

Their decision to kill the defendant may derive from any reason, no reason, or twelve different reasons, and the defendant is powerless to show that the jury may have abused its discretion. By this procedure, a capital trial is reduced to a gambling escapade in which the hazard of an incorrect guess is death.

In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), this Court held that a standardless statute which authorized the jury to assess costs against acquitted defendants, and which imposed the threat of imprisonment for nonpayment of the costs, violated the Due Process Clause. The following reasoning in *Giaccio* applies with equal force to Section 2901.01, Ohio Revised Code:

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits *or leaves judges and jurors to decide without any legally fixed standards*, what is prohibited and what is not in each particular case . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce." (Italics added)

The *Giaccio* decision turned squarely on the proposition that the Due Process Clause forbade Pennsylvania to leave "judges and jurors free to decide, without any legally fixed standards," 382 U.S. at 402-403, whether to impose upon a defendant a small amount of costs. Ohio permits its jurors the same standardless freedom in the infinitely more significant matter of condemning men to death. The *Giaccio* decision supports, if it does not compel, the conclusion that the grant of discretion to capital juries in Ohio is an unconstitutional practice because it provides no standards by which an abuse of discretion can be curbed or even sub-

jected to review. The power to decree death granted under Section 2901.01, Ohio Revised Code, is broad, arbitrary, absolute and untouchable.

The arbitrary procedure prevailing in Ohio offends not only against the Due Process Clause but also against the Equal Protection Clause. The "constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' . . . " *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) quoting *Chambers v. Florida*, 339 U.S. 227, 241 (1940).

The Equal Protection Clause prohibits the arbitrary selection of a class of individuals for the imposition of a special burden. It requires as a minimum that classes created by the legislature be rationally related to a legitimate governmental purpose. *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967), particularly where "legislation . . . involves one of the basic civil rights of man . . . , strict scrutiny of the classification which a state makes . . . is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

In the *Skinner* case this Court struck down as a violation of the Equal Protection Clause a statute which provided for the sterilization of those guilty of embezzlement, holding arbitrarily excluded those guilty of embezzlement, holding that such legislation creates an "invidious discrimination." If *Skinner* means that a state cannot constitutionally distinguish between members of a certain class in the matter of punishment to be imposed, then Ohio cannot give its juries power to draw a distinction between those capital defendants who receive the death penalty and those who are sentenced to life imprisonment.

The "invidious discrimination" permitted by the Ohio death penalty statute is clear. The distinction in *Skinner* rested upon an arbitrary classification which, on its face, permitted such discrimination, but the Ohio statute provides absolutely no basis for differentiation between convicted capital defendants.

It is this *irrational* differentiation permitted by standardless death-sentencing statutes which violates the Equal Protection provisions of the Fourteenth Amendment. As stated in Justice Tobriner's dissent in *In re Anderson*, 69 Cal.2d at ___, 447 P.2d at 145-146 (1948):

> "The procedure under (death sentencing statutes) providing no classificatory criteria whatsoever permits the trier of fact *arbitrarily* to determine whether particular convicted capital defendants should suffer death rather than life imprisonment. Such absence of classification renders the current procedure insufficient to satisfy even the *minimum* requirement of the equal protection clause that different treatment of persons prima facie similarly situated must bear some rational relation to a discernible legislative purpose. In failing to provide any rational basis upon which to justify an imposition of the death penalty on those particular convicted capital defendants sentenced to death rather than life imprisonment, (standardless death-sentencing statutes) make 'as * * * invidious a discrimination' against those upon whom the trier of fact imposes the death penalty 'as if (they) had selected a particular race or nationality for (that) oppressive treatment.' (Skinner v. State of Oklahoma, 316 U.S. 535, 541) 'It is clearly unconstitutional to enable a public official (let alone an ad hoc group of 12 individuals)[37] to * * * engage in invidious discrimination among persons or groups * * * by use of a statute providing persons a system of broad discretionary * * * power.' (Cox v. State of Louisiana, 379 U.S. 536, 557 (1956) . . . ; Yick Wo v. Hopkins, 118 U.S. 356, 366-368

[37]This insertion appears in the *Anderson* dissent. The italics throughout appear in the original.

(1886) . . .) Thus, the trier of fact's absolute power to impose the death penalty on a convicted capital defendant violates the basic interdictment of the equal protection clause that no person shall hold 'a naked and arbitrary' power to make invidious discriminations against another. (Yick Wo v. Hopkins, 118 U.S. at pp. 366-368 . . .)"

CONCLUSION

The unitary trial forced petitioner to elect between constitutional guaranties: his right against self-incrimination *vis-a-vis* his right to be heard on the issue of punishment. Petitioner's exercise of the Fifth Amendment Privilege was unnecessarily penalized by the single-verdict procedure. His punishment was determined, therefore, by a jury having less than all of the relevant evidence on that issue, and totally without instruction as to what standards should guide its decision on whether he should live or die.

The unconstitutionality of the Ohio procedure is threefold: it violates the Self-Incrimination guaranty, the Due Process Clause and the Equal Protection of the Law Clause.

The judgment below should be reversed and the cause remanded with directions to reconsider the issue of punishment in light of this Court's opinion.

Respectfully submitted,

JOHN J. CALLAHAN
801 Security Building
Toledo, Ohio 43604

Of Counsel:

Dan H. McCullough
William T. Burgess
William D. Driscoll
Gerald S. Lubitsky
Cary Rodman Cooper

September 4, 1970

APPENDIX

SENTENCING PROCEEDINGS

[R.438-440]

Thereupon, on November 15, 1967, the following proceedings were had:

The Court: This is Cause 44585, State of Ohio v. James Edward Crampton, indicted on the charge of murder in the first degree. On October 27th, through the 30th, this case was tried to a jury and was submitted to the jury on October 30th and the jury in open court on October 30th at 6:15 P.M. in the presence of the defendant and his counsel, returned a verdict finding defendant guilty of murder in the first degree as charged in the indictment, with no recommendation of mercy.

Motion for new trial was filed on November 2nd and it is here for hearing.

(Thereupon the motion for new trial was argued to the court, which was overruled by the court.)

The Court: We will now proceed to the matter of sentencing. Mr. Crampton, you may stand up.

It is my duty to inform you in open court that on October 30, 1967, in your presence, the jury that was duly empaneled to try this case returned a verdict finding you guilty of the offense of murder in the first degree with no recommendation of mercy. Does Mr. Crampton or his counsel have anything to say as to why judgment should not now be pronounced?

Mr. Callahan: Defendant would like to make a statement, Your Honor.

The Court: Very well.

Mr. Crampton: Please the Court, I don't believe I received a fair and impartial trial because the jury was prejudiced by my past record and the fact that I had been a drug addict, and I just believe I didn't receive a fair and impartial trial. That's all I have to say.

The Court: The defendant having failed to show sufficient cause as to why judgment should not now be pronounced, we now come to the question of sentence.

Stand up, Mr. Crampton. It is most unpleasant for me and I know equally unpleasant for you, but it is a duty I have to perform under the statute. It is the sentence of the Court that in accordance with Sec. 2901.01 Revised Code, that I am now sentencing you to the death penalty. It is the sentence of the court that within 30 days of today, November 15, 1967, the Sheriff of Lucas County, Ohio shall convey you in a private and secure manner to the Ohio Penitentiary where you shall be received by the Warden and safely kept there until the 13th day of March, 1936, when the death penalty will be executed in accordance with Section 2949.22, Ohio Revised Code.

It is further the sentence of the Court that you pay the costs of prosecution, including cost of assigned counsel and providing of transcripts and execution is awarded therefor.

It is further ordered that the writ for the execution of the death penalty as heretofore pronounced by the court against you, shall be issued to the Sheriff of Lucas County carrying that order into execution and the warden of said Ohio Penitentiary shall make return of these proceedings under and by virtue of said writ to the Clerk of this court, who shall record said writ and the return thereof in the records of this cause.

Anything further from counsel?

Mr. Callahan: Nothing further.

Mr. Resnick: Nothing further.

The Court: There is another thing I should do and that is to tell you in open court that you have a right to appeal this jury verdict, Mr. Crampton, and you have 30 days from today to file a notice of appeal, and if the attorneys assigned to you are satisfactory to you, I will reappoint them for appeal.

Mr. Crampton: Your Honor, I would rather have Mr. Callahan and Mr. Lubitsky because they know about the case.

The Court: You are satisfied with their competency to handle the appeal?

Mr. Crampton: Yes.

The Court: Very well, that will be done.